No. 264

Office - Supreme Court, U.
FILED
AUG 17 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

JEFFERY M. ADDISON, ET AL.,
Petitioners,

against

HURON STEVEDORING CORP.

JAMES AARON, ET AL.,
Petitioners,

against

BAY RIDGE OPERATING CO., INC.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Goldwater & Flynn and Max R. Simon, on behalf of the petitioners, pray that writs of certiorari be issued to review the judgments entered in the above entitled cases by the United States Court of Appeals for the Second Circuit sustaining the judgments entered by the United States District Court for the Southern District of New York.

Summary of Litigation

These petitions involved two consolidated cases previously before this Court wherein it determined that certain higher rates of pay in the stevedoring industry in the Port of New York for work performed at night, Satur-

day, Sundays and holidays were premium or differential rates of pay for performing disagreeable work at undesirable hours, *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446, and concluded that such rates were required to be included in the rate of pay for the purpose of computing proper overtime wages due these petitioners under Section 7 of the Fair Labor Standards Act of 1938 (29 U. S. C. 207(a)).

This decision sustained a unanimous decision of the Court of Appeals for the Second Circuit, 162 F. (2d) 665, which had reversed a ruling of the United States District Court for the Southern District of New York, 69 F. Supp. 956.

During the pendency of the first appeal to this Court, Congress had passed what is now known as the Portal-to-Portal Act of 1947 (29 U. S. C. 251, et seq.). Title 29, Sections 258 and 260, hereinafter referred to as Sections 9 and 11 of the Portal Act, purportedly granted additional statutory defenses retroactively in actions under the Fair Labor Standards Act. This Court, therefore, remanded these cases for further action by the trial court. 334 U. S., at page 477.

During trial, following the remand, further statutes were passed with the purpose of overturning the prior determination of this Court (Public Laws 177 and 393, 81st Congress, 1st Session, Chaps. 352 and 736). These amendments, hereinafter referred to as the 1949 Amendments to the Fair Labor Standards Act, are now found in 29 U. S. C. 207 (d) (5), (d) (6), (d) (7), and 207 (g).

The District Court then upheld the statutory defenses based upon this legislation in such a way as to eliminate almost totally the recovery of the petitioners except for small sums in exceptional circumstances, 96 F. Supp. 142 (6 ff.*; Concl. of Law XIV, 218-9).

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* Unless otherwise indicated, numbers refer to pages of printed transcript of record.

On the appeal from the determination of the District Court, the Court of Appeals for the Second Circuit sustained the judgments below except that it reversed as to that part of the judgment which had held that the defendants had no liability where any amounts due any of the petitioners for overtime wages were less than $1.00 in any workweek, and remanded the cases to the District Court for determination of amounts due in accordance with its opinion. 204 F. (2d) 88 (99 ff., 110). The judgments of the Court of Appeals for the Second Circuit were entered on March 20, 1953 (127-9).

Jurisdiction

This Court has jurisdiction to entertain these petitions under Section 1254 (1) of the Judicial Code (28 U. S. C. 1254 (1)).

Basic Question Involved

Petitioners ask this Court to determine whether the United States of America may, through its legislative branch, constitutionally retroactively invalidate its debts to its citizens after this Court has upheld the validity of the obligations.

The Statutes Involved

The cases are primarily concerned with the interpretation and perhaps even the constitutionality of two statutes* of the United States now found in Title 29, U. S. C., Sections 258 and 260 (Sections 9 and 11 of the Portal-to-Portal Act) and Title 29, U. S. C., Sections 207 (d) (5),

* The pertinent sections of the statutes are quoted in full in an Appendix.

(d) (6), (d) (7) and (g). (The 1949 Amendments to the Fair Labor Standards Act known originally as Public Law 177, Chapter 352, and Public Law 393, Chapter 736, 81st Congress, 1st Session.)

Section 9 of the Portal Act relieves an employer of liability for statutory wages or overtime for any prior violation of the Fair Labor Standards Act if he proves such violation resulted from action in good faith "in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation of any agency of the United States". Section 11 of the Portal Act allows a trial court to relieve an employer from liability for liquidated damages under the Fair Labor Standards Act if the employer shows "to the satisfaction of the court" that his failure to comply with the statute was "in good faith and that he had reasonable grounds" for so believing.

The 1949 Amendments to the Fair Labor Standards Act (among other things, and to the extent here involved) redefined retrospectively (P. L. 393, 81st Cong., 1st Sess., Sec. 16(e)) the regular rate of pay under Section 7 of the Act to exclude extra compensation at premium rates paid for the so-called "clock hour overtime" held by this Court not to constitute true statutory overtime on the first appeal in these cases, as well as for hours in excess of eight in one day or forty in a week where such premium rates were at least one and one-half times the rate established in a collective bargaining contract in good faith for like hours performed during the so-called "basic" eight-hour workday or forty-hour workweek (29 U. S. C. 207 (d) (5), 207 (d) (7)). The Amendments further provided that such compensation was creditable, retroactively, towards any overtime due pursuant to Section 7 of the Fair Labor Standards Act (P. L. 393, *supra*, Sec. 16 (e)), just as if the former statute in effect when the work was performed had always read as it did after the later amendments.

The avowed purpose of the 1949 Amendments (to the extent involved here) was to reverse the statutory construction placed upon the original Section 7 by this Court when these cases were first here and to eliminate the recoveries awarded to petitioners herein by this Court.

Application of the Statutory Provisions by the Courts Below

In applying these statutory provisions to the cases at hand, Judge Leibell in the District Court, and Judges Swan, Learned Hand and Frank in the Court of Appeals, *each* published opinions, mutually diverse and conflicting, setting forth their understanding as to the application of the cited sections to the cases at hand particularly with respect to the intent of Congress and the constitutionality of the statutes.

Judge Leibell held the statutes did not deprive petitioners of their property without due process of law under the Fifth Amendment to the Constitution even though they retroactively destroyed petitioners' right to receive overtime wages due them in accordance with the prior decision of this Court (69-80). In evaluating the good-faith defenses under Section 9 of the Portal Act, Judge Leibell held that defendants were required to meet an objective test of their good faith (29).

While a majority of the Court of Appeals affirmed the determination of Judge Leibell with respect to the constitutionality of the statutory sections involved, Judge Frank strongly dissented with respect to the 1949 Amendments (116 ff.). He indicated that Congress had failed to convince him of the necessity for retroactively depriving the petitioners of overtime wages earned, thus, in effect, cancelling the debts of the United States to its own citizens (116-7). He disputed with his colleagues the constitutional validity of the retroactive amendments.

Judge Swan followed Judge Leibell in sustaining the constitutionality of the statutes involved, but noted that Congress was incompetent to declare that this Court had misconstrued the Fair Labor Standards Act (102). He further held that Congress lacked authority to enact legislation declaring that the Fair Labor Standards Act did not confer rights which this Court had held were existent (102). Despite this conclusion, Judge Swan illogically affirmed the validity of the legislation (102-3). Judge Swan, however, rejected the Wage and Hour Administrator's objective test of good faith under Section 9 of the Portal Act, 29 C. F. R. Ch. V, Part 790.15 (a-d), accepted by Judge Leibell, holding the test of reasonableness found in Section 11 also applied to Section 9 (104).

Judge Swan also differed with Judge Leibell with respect to the crediting of certain "differential" rates where the "clock" overtime for night or special day work was less than 150% of the equivalent "basic" rate for the same type of cargo or operation, towards the overtime wages due (105-9). Judge Leibell had held that such amounts were creditable under the 1949 Amendments to the Fair Labor Standards Act (216). Judge Swan rejected this conclusion and held the defendants were entitled to credit the amounts under Section 9 of the Portal Act (107-8), even though Judge Leibell had ruled that the defendants had not pleaded or proved any administrative ruling in connection with these payments (52-3).

Judge Learned Hand concurred in the result but disagreed completely with the reasoning of the opinion (110 ff.). Judge Hand also indicated dissatisfaction with the prior determinations of his own Court in sustaining the constitutionality of the Portal Act, which reasoning has generally been followed in like decisions in other circuits (110).

Judge Hand presumed the judicial right to examine the legislative findings of Congress to determine whether the

retroactive destruction of the vested contractual rights of the petitioners herein was justified (111). He concluded that it was the duty of Congress to weigh the comparative injustices to the employees and the employers and determine who should bear the loss (115).

The opinions below, therefore, present no clear-cut doctrine of decision which can be used as a guide to courts considering similar problems in the future.

The Questions Presented

The following questions never heard or resolved by this Court should be decided in these appeals:

1. Whether the Portal Act and the 1949 Amendments may be applied to these actions to eliminate retroactively debts owed by the United States to its own citizens where it is the real party in interest.

2. Whether Congress intended the Portal Act to apply retroactively to cases where employees actually worked all the hours for which they are claiming overtime wages.

3. Whether an employer is required to meet a strict objective test of reasonable state of mind in sustaining his burden of establishing the good-faith defense created by Section 9 of the Portal Act.

4. Whether the United States, the real party in interest, may establish a good-faith defense under the Portal Act where it refused to follow rulings of its agency charged with the responsibility of enforcing the Fair Labor Standards Act.

5. Whether the Portal Act and the 1949 Amendments are unconstitutional on the ground that they deprive employees retroactively of vested contractual rights.

6. Whether the Portal Act and the 1949 Amendments are unconstitutional in that they deprive employees' coun-

sel retroactively of the attorneys' fees to which they are entitled on the basis of services performed at the invitation of the statute as it existed at the time petitioners performed their work and counsel rendered their services.

7. Whether the defendants may establish a defense under the 1949 Amendments as to any group of employees whose premium "overtime" rate was not a full 150% of the regular straight-time rate for the same cargo or operation and whether they may receive acquittance or partial credit towards overtime wages due where such rate is not equal to 150% of the straight-time rate.

8. Whether the union contracts fixing the wage rates and working conditions on which defendants rely in establishing their defenses under the 1949 Amendments were entered into in good faith between the parties involved.

Specification of Errors

Petitioners contend that the Court of Appeals below erred in the following respects:

1. Holding that the Portal Act and the 1949 Amendments were applicable to these actions.

2. Failing to apply a strict objective test to the conduct of the defendants in determining the validity of their good-faith defenses under Section 9 of the Portal Act.

3. Upholding the constitutionality of the Portal Act and the 1949 Amendments, as here applied.

4. Holding that defendants established a good-faith defense under Section 9 of the Portal Act where they deliberately ignored the rulings of the Wage-Hour Administrator and the courts.

5. Holding under the 1949 Amendments that the union contracts involved herein were negotiated in good faith.

6. Permitting the defendants to receive acquittance for overtime wages due where the premium rate was not a full 150% of the regular straight-time rate.

Reasons for Granting the Writs Herein

1. The cases present a question of extreme national importance.

When this action was last before this Court in 1948, the writs of certiorari requested by the defendants were granted because of the vast problem of national importance involved. 334 U. S. 446, 459. The same reasons which made this case one of national importance in 1948, accentuated by the complications and problems of interpretation interposed by four amendatory statutes not yet considered by this Court, still exist today.

As noted by Mr. Justice Reed in his decision in 1948, 334 U. S., at page 453:

> "Throughout all these proceedings the petitioners have been represented by the Department of Justice, since the United States under its cost-plus contracts with the petitioners is the real party in interest. Substantially all stevedoring during the war years was performed for the account of the United States. The Solicitor General notes that prior to the decision in the Circuit Court of Appeals, 118 suits had been instituted on behalf of longshoremen, and since that time approximately 100 new complaints have been filed. Contracts of the same general type are said to have been in effect in all our maritime areas."

Most of these suits are still undetermined, awaiting the final outcome here. These cases are designed to test out

basic issues for similar claims involving approximately 15,000 employees. This Court should clearly define the legal principles involved—something which petitioners believe has not been done by the courts below.

Under the prior decision of this Court the petitioners herein were awarded substantial overtime wages. An equal amount of liquidated damages and a large counsel fee would have automatically followed. However, the Congress then nullified the decision of this Court by enacting the statutes here sought to be reviewed.

Since this Court felt that the issues involved were of sufficient national importance to warrant review once, when it supported the determination of the Court of Appeals in favor of the petitioners, it should now review the rulings adverse to petitioners and examine carefully into the issues presented, so as to determine whether the lower courts erred in nullifying the decision of this Court and in destroying the substantial claims won by the petitioners at this bar.

2. The cases present important questions of Federal law which have not as yet been settled or heard by this Court.

Petitioners believe the salient issue here is that of interpretation of congressional intent as applied by the courts in construing these statutes. The four opinions of the two courts below present diverse and conflicting constructions of the pertinent statutes, not yet settled by this Court, which should be resolved here at this time.

It is essential that this Court settle clearly for the guidance of state and lower Federal courts whether Congress intended these statutes to permit the United States to eliminate retrospectively its debts to its citizens. Judge Frank held the 1949 Amendments unconstitutional for this reason (125-6). While petitioners generally sup-

port this conclusion, a holding of unconstitutionality is not essential to support petitioners' claims. A limited, and what petitioners believe is a proper, construction of the statutes is sufficient to uphold petitioners' claims.

The congressional history of the Portal Act makes it manifest that Congress intended that Act solely to relieve private employers from a liability totally unsuspected and suddenly thrust upon them because of the effect of the decision of this Court in *Anderson* v. *Mt. Clemens Pottery*, 328 U. S. 680.

Congressional findings in the preamble of the Portal Act, the statements of witnesses testifying before congressional committees and finally the memorandum of the President of the United States submitted to Congress when he signed the Portal Act, indicate that the retroactive defenses of good faith in conformity with and reliance upon rulings of an agency of the Government were confined to cases where the employer was charged with liability by reason of time *not* actually worked by his employees. 29 U. S. C. 251(a); H. R. Report No. 71, 80th Cong., 1st Sess.; S. Report No. 48, 80th Cong., 1st Sess.; H. Doc. 247, U. S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, pages 1827, et seq. This is not the case here. The employees here concededly worked all the time for which they are requesting proper overtime payments, and no portal-to-portal activities are involved.

There is no question but that certain general sections of the Portal Act apply indiscriminately (cf. *Unexcelled Chemical Corp.* v. *U. S.*, —— U. S. ——, 97 L. Ed. 486, adv. rep.), but the sections dealing with the *retrospective* establishment of the additional defenses were directly related in the congressional history of the statute to the problem created by the decision in the *Mt. Clemens* case, *supra*. There is no evidence warranting the conclusion that Congress intended the good-faith defenses to apply

retroactively to non-portal situations or that anyone connected with the management of the bill in the Congress or the President of the United States upon his signing the bill believed that the statute would be so applied. The President, in his message upon the signing of the bill, stated as follows, H. Doc. 247, U. S. Code Cong. Serv., 80th Cong., 1st Sess., 1947, at page 1827:

> "The primary purpose of this Act is to relieve employers and the Government from potential liability for billions of dollars in so-called 'portal-to-portal' claims. These claims have emerged since judicial interpretation of the 'Wage and Hour Law' raised the possibility that employers might be required to pay back wages for certain activities which in most industries had not previously been considered by either workers or employers to be compensable. I believe that, in the interest of the economic stability of our Nation, it is essential to clarify this matter by statute. * * *
>
> "I am confident that the purpose of the main provisions of the Act is to eliminate the immense potential liabilities which have arisen as the result of the 'portal-to-portal' claims. It is not the purpose of the Act to permit violation of our fundamental wage and hour standards, or to allow a lowering of these standards. This is evident from the findings of the Congress set forth in Section 1 of the Act as to the need for legislation.
>
> "Some doubts have been expressed to me, however, concerning the effects of this legislation upon our wage and hour standards.
>
> "Section 2 of the Act relates to existing claims. From my consideration of this Section, I understand it to be the intent of the Congress to meet the problem raised by portal-to-portal claims, but not to invalidate all other existing claims. The plain language of Section 2 of the Act preserves minimum wage and overtime compensation claims based upon activities which

were compensable in any amount under contract, custom or practice. Various provisions of the Act such as Sections 3, 9 and 12 would be rendered absurd or unnecessary under any other interpretation. Moreover, a contrary interpretation would raise difficult and grave questions of constitutionality."

The activities here were concededly compensable. In the language of the message of the President, it is, therefore, "absurd and unnecessary" to apply the provisions of Section 9 to these existing claims. And, as suggested by the President and raised by the petitioners herein, to do so "would raise difficult and grave questions of constitutionality".

None of the four decisions in the courts below in this case have ruled on this point nor have petitioners found any cases in any other Courts of Appeal which discusses the problem as outlined here.

The President further commented on Section 9 of the Portal Act as follows, *supra*, page 1827:

> "I wish also to refer to the so-called 'good-faith' provisions of Sections 9 and 10 of the Act. It has been said that they make each employer his own judge of whether or not he has been guilty of a violation. It seems to me that this view fails to take into account the safeguards which are contained in the Sections. The employer must meet an objective test of actual conformity with an administrative ruling or policy. If the employer avails himself of the defense under these Sections, he must bear the burden of proof."

In discussing the meaning of "good faith" Judge Leibell followed the views expressed by President Truman (33). The same test has been adopted by the Wage-Hour Administrator 29 C. F. R. Ch. V, Part 790.15 (a-d). Judge Swan, writing the ruling opinion for the Court of Appeals,

took sharp issue with this concept and stated that it was not necessary for defendants to "meet an objective standard of reasonableness", but merely to satisfy a nebulous subjective "honest intention to ascertain what the Fair Labor Standards Act requires and to act in accordance with it" (104).

The Court of Appeals thus clearly repudiated the grounds on which Judge Leibell rested the defenses under the Portal Act and in so doing indicated the court's refusal to require defendants to meet an objective test. The appellate court stated it was sufficient to establish a defense under Section 9 if the employer acted only with "reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act (104). But this is the language of Section 11 of the Portal Act which permits a court in its discretion to relieve the defendant of *liquidated damages*. It patently establishes a lesser standard of conduct on the part of the employer than that required by Section 9. It was clearly the intention of Congress to hold the employer to a strict test of objectivity in order to be relieved of all liability under Section 9, but to require him only to act reasonably in order to be forgiven liquidated damages.

Despite the fact that the various administrative rulings which defendants claimed they relied upon to support their defense under Section 9 were in direct conflict with the ruling of the Wage-Hour Administrator on the issue at hand, the Court of Appeals held that an employer could choose that governmental opinion which he "honestly believes to be correct" (104). In effect, such a rule permits an employer to choose subjectively that ruling which benefits him, and to reject any ruling detrimental to him.

This is not the objective test meant by Congress in the language of the statute as construed by the President of the United States in his message accompanying his signature to the Act. Self-interest may permit a man to act

reasonably and thus forgive him of a penalty and liquidated damages under Section 11 of the Portal Act. But under Section 9 an objective or impartial standard does not permit him to rely subjectively on the ruling of the agency which economically benefits him when there is a conflicting ruling of the agency officially responsible for administering and interpreting the statute in question.

On October 15, 1943, L. Metcalfe Walling, the Administrator of the Wage and Hour Division, wrote to the War Shipping Administration as follows:

> "The Fair Labor Standards Act requires that hours worked in excess of forty in a work week must be paid for at not less than one and one-half times the employee's *regular* rate of pay. When an employee is paid a stated rate for daytime work, and a higher rate for the same work performed outside of daytime hours, it is my opinion that the higher rate is not a part of overtime pay required by the Act, but in fact is simply the regular rate of pay, and if the employee works more than forty hours in a workweek, the hours in excess of forty must be paid for at one and one-half times that higher rate." Pltfs. Ex. 140, (487-9).

This opinion, which was immediately brought to the attention of the stevedoring companies in the Port of New York, including defendants (310-12; 318-19; Defs. Ex. SS, 500-1; Plfs. Ex. 133, 514-15; Plfs. Ex. 134, 516), expressed in clear cut fashion petitioners' interpretation of Section 7 of the Fair Labor Standards Act, later approved by this Court.

On May 15, 1943, District Court (now Court of Appeals) Judge Duffy decided *International Longshoremen's Association, Local 815* v. *National Terminals Corporation,* 50 F. Supp. 26 (E. D. Wis.), later aff'd 139 F. (2d) 853 (C. A. 7, 1944) under the name of *Cabunac* v. *National Terminals*

Corporation. Judge Duffy stated, in ruling on labor contracts identical to those at hand, 50 F. Supp. at page 29:

> "We cannot be governed by the contract definition of 'overtime', as it is clear that the overtime mentioned therein does not correspond to the overtime contemplated by the statute. * * * It seems very evident that the 'overtime' mentioned in the contracts is the 'regular rate' to be paid for work on the night shift, on Sundays, and on holidays.
>
> "The statute uses the term, 'the regular rate at which he is employed.' We must determine the regular rate at which each of the plaintiffs was employed. The higher rate for night, Sunday and holiday work is just as much a regular rate as the lower rate for daytime work. The higher rate was merely an inducement to accept employment at times which were not as desirable from a workman's standpoint."

On January 28, 1944, Mr. Justice Minton, then on the Seventh Circuit, affirmed the opinion of Judge Duffy, holding, 139 F. (2d) at pages 854-55:

> "It seems evident to us, as it did to the District Court, that the 'overtime' rate was merely the higher rate necessary to induce defendant's employees to accept employment at hours which were not very desirable from a workman's standpoint, and that this rate is the 'regular' rate to be paid for work on the nightshift, on Sundays, and on certain holidays, within the meaning of the Fair Labor Standards Act."

These legal determinations were also brought to the attention of the stevedoring industry in New York at the same time the Walling letter was discussed (38-9; 316-18; 313; 167-7, Fdgs. 146-9; 182, Fdg. 181), and also was cited approvingly by this Court when these cases were first before it, 334 U. S. at page 469.

In the light of these clear and unequivocal rulings of the Wage and Hour Administrator* and the courts of the United States, the defendants, after they had knowledge of these rulings, could not meet the "objective" test intended by Congress to be followed herein.

The debates in Congress and the Conference Committee Report on what became the Portal Act also support the conclusion that the employer who follows the guidance of another agency, in the face of a conflicting interpretation of the Wage and Hour Administrator, does so at his peril and may not have recourse to the Portal Act defense to bar recovery by his employees:**

(1) "Mr. Ball: I am concerned with the good faith provision of the conference report. I know of one particular case, for instance, in which an employer had one ruling from the Administrator of the Act, and a different ruling from the Interstate Commerce Commission. He relied on the one which said he was not covered by the Wage and Hours Act, but he did not have very much faith in it, because, as he was working under a War Department contract, he got the War Department to indemnify him for any particular suit for damages. So he was not relying in very good faith on the particular ruling he had. * * *"
1947 Cong. Rec., p. 4502 (Senate Debate on Conf. Rep.—May 1, 1947).

(2) "Mr. Walter: The defense of good faith is intended to apply only where an employer inno-

* The record is clear that this opinion of Walling was always considered by the Department of Labor, Wage and Hour Division, to be a firm ruling which was never changed, altered or relaxed during the period in question (421-2).

** The Wage-Hour Administrator in an Interpretative Bulletin issued for the guidance of employers stated that an employee could not rely in good faith on an order, opinion or ruling which he knew to be "rescinded, modified or determined by judicial authority to be invalid" (29 C. F. R. Ch. V, Part 790, 17(h)).

cently and to his detriment, followed the law as it was laid down to him by governmental agencies, without notice that such interpretations were claimed to be erroneous or invalid. It is not intended that this defense shall apply where an employer has knowledge of conflicting rulings and chose to act in accordance with the one most favorable to him."

1947 Cong. Rec., pp. 4514-4515 (House Debate on Conf. Rep.—May 1, 1947).

(3) "Mr. Mackinon: Mr. Speaker, as a member of the Labor Committee I have been interested in the good-faith section of this Portal-to-Portal bill. In several cases which were discussed on the floor of the House it appears that there were conflicting rulings as to the employer's obligations.

Is an employer in good faith when knowing of two conflicting rulings he claims to have relied on one of them? The answer must be that having notice of conflict, he cannot be said to have relied in good faith when he picks one of the rulings on which to rely and, particularly, it seems to me, under the language of the bill, when he relies on the ruling that is most favorable to his, the employer's interest."

1947 Cong. Rec., p. 4516 (House Debate on Conf. Rep.—May 1, 1947).

(4) "Mr. Keating: When this bill was up for its original consideration, I made some remarks as to the good-faith defense. As a member of the sub-committee which drafted the original bill, I do not believe that such defense is intended to apply where an employer has notice of conflicting rulings, but only where he innocently in good faith relied upon a ruling believing it to be valid."

1947 Cong. Rec., p. 4517 (House Debate on Conf. Rep.—May 1, 1947).

Nevertheless, the courts below held that the defendants had successfully satisfied the requirements of Section 9 of the Portal Act by relying on a series of rulings all of which were either handed down prior to the specific opinion of the Administrator of the Wage and Hour Law in October, 1943 and the decision of Judge Duffy in May, 1943, or were made with specific knowledge of these rulings by a governmental agency, expressing solely a litigating position in a desire to reduce the costs of wartime stevedoring operations to the Government. An analysis of these various rulings indicates as follows:

1. The Dorothy Williams letter (36; Fdgs. 62-84) was written by a minor official of the Wage and Hour Division within a few weeks after the effective date of the Act in December, 1938. If it was of sufficient status to permit the defendants to rely on its content, it was most certainly overruled by the opinion of Administrator Walling expressed in the letter of October 15, 1938. 43

2. Similarly, if defendants had any right to rely on paragraphs 13, 69-70 of Interpretative Bulletin No. 4 of the Wage and Hour Administrator (46-8; Fdgs. 89-94) the generalized discussion there was specifically superseded as to the particular problem at bar by the later opinion of Administrator Walling. Petitioners also believe that the interpretation placed on Inter. Bull. No. 4 by the lower courts is completely inconsistent with the prior mandate of this Court at bar. 334 U. S. at pages 456-7, 472-3.

3. The approvals of wage rates by the National War Labor Board in November, 1942 (38; Fdgs. 104-113) and the approvals of wage schedules in the labor contracts for reimbursement purposes by the War Shipping Administration in March, 1943 (38; Fdgs. 114-135a) did not purport to be interpretations of the Fair Labor Standards Act but were merely automatic approvals of wage rates prescribed

by union agreements and would not entitle the defendants to plead "reliance in good faith", once they had knowledge of the Walling letter.

4. The opinion of an Army officer on June 15, 1942 (37; Fdgs. 95-103) could not provide the basis for reliance once defendants had knowledge of the Walling ruling and the Duffy decision.

5. Finally, it would appear that the series of letters or so-called rulings received from the War Shipping Administration and the relationship of the conflicting views between the War Shipping Administration and the Wage and Hour Administrator (40-3; Fdgs. 193-7, 168, 192, 247, 117-20, 235-40, 246) do not constitute the type of "formalized conduct" or "affirmative action", or "interpretative ruling" required to establish a defense. See *Brown* v. *Dunbar & Sullivan,* 189 F. (2d) 871, 876 (C. A. 2); *Knudsen* v. *Lee & Simmons,* 89 F. Supp. 400, 406 (U. S. D. C. S. D. N. Y.); *Wolferman* v. *Gustafson,* 169 F. (2d) 759, 764 (C. A. 8). See particularly Administrator's Int. Bull., C. F. R. Ch. V, Section 790-17 (f); and the President's message accompanying signature of the Portal Act on May 14, 1947, U. S. Code Congress. Serv., 80th Cong., 1st Sess., 1947, pages 1827-8.

In order to simplify the issues before the lower court, petitioners abandoned all claims prior to the ruling of the Wage and Hour Administrator and the decision of Judge Duffy in the *Cabunac* case. They conceded in effect, for the purposes of this case, that defendants could establish a good-faith defense under Section 9 of the Portal-to-Portal Act based on the various rulings set forth above up to the time when they had knowledge or should have had knowledge of the Walling and District Court rulings, which was approximately October 15, 1943.*

* This action was commenced in September, 1945. Petitioners, therefore, waived any claims between 1939 and 1943 which they had asserted up to the trial on the remand.

Petitioners, therefore, assert as did President Truman in his message, *supra,* when he signed the Portal Act, that this Act "introduces new and possibly ambiguous language, the effects of which can be accurately measured only after interpretation by the courts". The courts below are in conflict as to their interpretation of the test of conduct to be applied to the facts of this case in connection with the defenses asserted on the trial after remand.

This Court has not yet laid down criteria for the guidance of the lower courts in similar actions. It is important not only to the petitioners in this case, but to all other litigants having cases dealing with these statutes. Petitioners feel that it is necessary for this Court to decide squarely these important questions of Federal law.

3. The constitutionality of two statutes is involved.

This Court has not yet passed upon the constitutionality of the Portal Act of 1947 or the 1949 Amendments. While the Court has several times denied certiorari with respect to the Portal Act, it has not yet formally passed upon the statute itself.* This is a case of first impression for the 1949 Amendments.**

Petitioners contend that these statutes violate their constitutional rights under the Fifth Amendment of the Con-

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* *Battaglia* v. *General Motors Corp.*, 169 F. (2d) 254 (C. A. 2), cert. den. 335 U. S. 887;
Darr v. *Mutual Life Ins. Co.*, 169 F. (2d) 262 (C. A. 2), cert. den. 335 U. S. 871;
Fisch v. *General Motors Corp.*, 169 F. (2d) 266 (C. A. 6), cert. den. 335 U. S. 902;
Atallah v. *Hubert & Son Inc.*, 168 F. (2d) 993 (C. A. 4), cert. den. 335 U. S. 868.

** While the Court of Appeals for the Ninth Circuit has also passed upon the statute, petitioners believe this is the first time that any request for review of the statute has been made to this Court (*Moss* v. *Hawaiian Dredging Co.*, 187 F. (2d) 442).

stitution of the United States by depriving them of their property without due process of law. *Ettor* v. *City of Tacoma*, 228 U. S. 148. Judge Hand held below, petitioners' right to secure proper overtime wages due in accordance with the language of Section 7 of the Fair Labor Standards Act, as it existed at the time they performed their longshoring activities, was a vested right (112). See also *Lynch* v. *United States*, 292 U. S. 571, 579; *Larsen* v. *Wright & Cobb Lighterage Co.*, 167 F. (2d) 320 (C. A. 2); *Roland Electrical Co.* v. *Black*, 163 F. (2d) 417 (C. A. 4, 1947).

The opinions of Judges Swan and Leibell presume that Congress can cancel this vested right since it was created under Federal authority (76-77; 102). Both Judges Swan and Leibell also presume that Congress cannot examine into the validity of the purported necessity found by Congress for passage of the statutes in question.

Judges Frank and Hand, however, did consider the validity of the legislative intentions, Judge Frank holding them invalid in his dissent (123-5) and Judge Hand sustaining Congress (114-5).

Judge Swan further agreed that "Congress was incompetent to declare that the Supreme Court had misconstrued the Act or that the Act did not confer rights which the Court declared it did" (102). Yet he reached a result inconsistent with the doctrine he accepted. And Judge Frank in his dissent appropriately concluded (125):

> "Omitting the camouflage, this is a case in which the United States, having lost a lawsuit in court, has transferred the litigation from the courtroom to the legislative committee room, where it won. Our court today in effect decides that Congress, in aid of the Treasury, may thus enter what amounts to a specific judicial decree, in a pending case against the government, reversing the Supreme Court's previous de-

cision as to the correct legal rule applicable to the particular facts of that particular case. Such conduct by a legislature was deemed most unwise, dangerous and undemocratic centuries ago. It seems to me to go directly counter to whatever is sound and desirable in the notion of the separation of governmental powers. For it means that the legislature sits 'as a court of review to which parties * * * appeal when dissatisfied with the rulings of the court.' "

Petitioners request this Court to clarify the conflicting and inconsistent opinions with respect to judicial power to review legislative findings and the right of the government as a party in interest in a lawsuit to attack collaterally in its legislative branch an adverse determination in its judicial branch. Cf. 334 U. S. at pages 453-4.

To permit Congress to nullify retroactively the vested rights of petitioners here for overtime wages due would sanction a theory of jurisprudence completely foreign to the common law and constitutional inheritance of our system of government. The doctrine of judicial finality may well be said to be the cornerstone of our entire *constitutional* structure, since our system demands that there be some finality to litigation.

Our theory of government demands a complete separation of judicial and legislative functions. The Congress' constitutional power to legislate on interstate commerce sanctions the Fair Labor Standards Act of 1938 giving to petitioners the overtime wages at the rate of one and one-half times their regular rate of pay for all hours of work in each week in excess of forty hours. Const. Art. I, Sec. 8; *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100. This Court under its constitutional powers had the right to pass finally upon the congressional intent and meaning of this same Section 7 of the Fair Labor Standards Act. And, once rendered, this ultimate judicial interpretation of the legislative intent,

must stand under our form of government until Congress changes it *for the future.* It may not be constitutionally changed by Congress for the past *in the very cases where this Court has already ruled.* Any other conclusion violates the spirit of the Fifth Amendment to the Constitution and impliedly destroys our tripartite system of government.

Petitioners urge this Court to pass upon so important and fundamental a question as the proper application of these statutes to the cases at hand under the Fifth Amendment to the Constitution. They also urge this Court to use this opportunity to define the limits of congressional power in the passage of legislation collaterally attacking in these very cases the interpretation by this Court in the same cases of the act of a previous Congress.

This Court should also review this case in order to pass upon the most novel question of whether plaintiffs' attorneys here may by legislation of a subsequent Congress be constitutionally deprived retrospectively of their right to receive counsel fees based on the substantial services performed in these cases in reliance upon the statutory invitation of a previous Congress. Section 16 of the Fair Labor Standards Act as passed by the 75th Congress required the payment of the plaintiff-employees' "reasonable counsel fees" by the defendant-employer in an action commenced by the employees to recover overtime compensation due under Section 7. 29 U. S. C. 216 (b).

As noted by Judge Leibell, plaintiffs' counsel here, in good faith and in reliance on the language of Sections 7 and 16 (b) of the Fair Labor Standards Act as it existed at the time of the commencement of these actions (79), performed services which the trial court characterized as "substantial and of a very high caliber" (78). Plaintiffs' counsel have been engaged in this litigation to date for almost 8 years, and in the conduct of the cases have worked over 8,000 hours and have incurred legal disbursements in excess of $10,000. As a result of their efforts,

counsel achieved a successful determination in this Court in 1948 of the rights of not only their clients, but all other employees similarly situated in the numerous other actions to which reference has above been made. Such achievement would have resulted ordinarily in the automatic award of substantial counsel fees to plaintiffs' attorneys.

Assuming *arguendo* that the legislation in question is a valid exercise of congressional authority in so far as it eliminates retrospectively the employee-plaintiffs' right of recovery, it is quite another thing to take from *petitioners'* counsel the right of payment for hours which they worked and disbursements which they incurred solely on the basis of the language of the statute as it existed at the time of the commencement of these actions, performance of the services and incurring of the expenses.

Under ordinarily litigating circumstances, this problem would not arise, for it is an unusual case where a defendant is required to pay the attorneys' fees of a plaintiff. If this Court confirms the judgments below, *petitioners'* attorneys, who have already paid the printers and done all the work on invitation of an earlier Congress, will bear the entire burden of economic hardship here and the real party in interest, the United States, will receive a windfall by forgiveness of a later Congress.

The statutes involved, therefore, should not be interpreted as to eliminate *petitioners'* counsel's right to receive reasonable compensation. This Court should rule, having never done so, whether Congress intended the statutes to apply in such a way as to eliminate retrospectively counsel fees as well as overtime wages. These constitutional questions not only are novel, but they have never been passed upon by this Court.

4. The court below has improperly construed the decision and mandate of this Court.

The District Court allowed the defendants to credit contract "overtime" payments after eight daily or forty weekly "straight time" hours against their obligation to pay the statutory overtime compensation (67-8, 82, 84, 215, 217, 218). This ruling, as expressed in Conclusion of Law V, applies to plaintiffs when performing work as gangwaymen, headers or assistant foremen, thus involving so-called "skill differentials" (105). Since the contract "overtime" rates subjected to skill differentials were not a full 150% of the contract basic rates, defendants could not receive credit for them as "clock" overtime but only if the premium was paid for hours previously worked, under the 1949 Amendments. The Court of Appeals seems to have agreed with petitioners and reversed Judge Leibell in this aspect, because the payments were clearly not made because of hours previously worked, the higher rate being paid on the basis of the time of day or day of the week, without regard to whether eight or forty had been previously worked, respectively (105-6).

Nevertheless, the Court of Appeals determined that defendants were entitled in the case of the skill differentials to a partial credit towards the overtime wages due petitioners, by virtue of the effect of Section 9 of the Portal Act (108). But as to this Judge Leibell had already both found and ruled that the Portal defenses were not pleaded nor proved, in the case of the skill differentials (52-3).

In presuming to allow a partial credit for these premiums, the Court of Appeals was thus making an unwarranted holding in effect in conflict with the express determination and mandate of this Court when these cases were formerly here. 334 U. S. 446, at pages 466,

473, 475-6; see also 334 U. S., at pages 468-9, 470-1, cf. 494. This Court there indicated that the differentials were not paid in any sense because of the hours previously labored by the employees and that the employees were not paid any overtime premium because of the longer hours which they had worked. This Court, therefore, mandated the trial court to award petitioners full overtime pay with the differential rate included or averaged into the basic regular rate for the first forty hours.

Since the Court of Appeals has ruled that the 1949 Amendments are not applicable to this situation, while the trial court has found and concluded that the defense under Section 9 of the Portal Act does not apply, full recovery should automatically have followed, without any credit towards statutory overtime, in the case of the skill differential rates. In allowing an overtime credit on these rates, the trial court and the Court of Appeals have thus, in effect, failed to follow the decision and mandate of this Court and this Court should review the judgment below and correct the inconsistency with its own prior opinion in these cases.

5. The case should be reviewed and remanded in the light of important new evidence since the date of the trial on the remand.

The new statutory defenses which the lower courts sustained demand an atmosphere of good faith surrounding the conduct of the employer. Under Sections 9 and 11 of the Portal Act the defendants had to prove action *"in good faith"* in connection with their reliance on an administrative interpretation or ruling. The defenses under the 1949 Amendments require the background of a collective bargaining agreement negotiated *"in good faith"* between the employer-defendants and the union of which the employee-petitioners were members.

Findings 11 and 12 of Judge Leibell in the District Court provide the basis for the establishment of the defenses under the 1949 Amendments by holding that the plaintiffs were members in good standing of the International Longshoremen's Association during the period covered by their claims and that the labor contracts in effect during the period of time in question were negotiated in good faith and voted upon by the members of the locals to which the petitioners belonged (96).

The record of the trial on remand before Judge Leibell is completely devoid of any evidence to support this conclusion. Judge Leibell evidently based his findings on testimony introduced on the trial before Judge Rifkind in 1946 and certain related findings made by Judge Rifkind in 1947, several years before the Amendments became effective.

It should be pointed out that petitioners did not contest the testimony on which Judge Rifkind's findings were predicated because it was neither important nor relevant to the cases at that time. The defenses under the 1949 Amendments came into being while the case was actually being tried on remand before Judge Leibell. Petitioners had neither opportunity nor resources to secure evidence to the contrary or to rebut the general conclusion of good faith which defendants pleaded in support of their newly established defenses.

However, since the trial of the action before Judge Leibell official investigating bodies commissioned by the Governor of the State of New York and Federal and state grand juries have published the results of investigations of waterfront conditions in the Port of New York. All these reports contain one important conclusion: the stevedoring companies who employed the petitioners and who negotiated the labor contracts with the International Longshoremen's Association, the union of

which petitioners were theoretically members, were joined in a giant conspiracy of fraud and collusion which operated to the detriment not only of the employee members of the local unions, but also the general public and the Government of the United States.

We ask this Court to take judicial notice particularly of the Report and Testimony of the New York State Crime Commission, Legislative Document No. 70 (1953) entitled Fourth Report of the New York State Crime Commission (Port of New York—Waterfront).*

This report indicates that there were many instances of collusion between the officials of steamship and stevedoring companies on the one hand and union officials on the other (Fourth Report of the New York State Crime Commission, p. 12). For the period between 1947 and 1951, *e.g.*, it was found that the various stevedoring companies in question had paid to union officials the sum of $182,214 (New York State Crime Commission Public Hearing No. 5, Port of New York (Waterfront), *Testimony*, Vol. II, p. 864, Ex. No. 207).

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* The Federal courts will take judicial notice of state statutes and governmental action taken pursuant to such statutes, as well as of the official documents and reports of state bodies and officers. See, for example, *Romero* v. *United States*, 68 U. S. 721, 742; *Hooper* v. *Covington*, 118 U. S. 148, 151; *Coffee* v. *Groover*, 123 U. S. 1, 11; *Gormley* v. *Bunyan*, 138 U. S. 623, 635; *Gerling* v. *Baltimore & O. R. Co.*, 151 U. S. 673, 678; *Mills* v. *Green*, 159 U. S. 651, 657; *New York Indians* v. *United States*, 170 U. S. 1, 32; *Gibbes* v. *Zimmerman*, 290 U. S. 326, 331; *Bowen* v. *Johnston*, 306 U. S. 19, 23; *Carolene Products Co.* v. *United States*, 323 U. S. 18, 28; and *Kirby* v. *Lewis*, 39 F. 66, 77. The New York State Crime Commission was created by Executive Order of the Governor of the State of New York dated March 29, 1951 pursuant to Section 62 (8) of the Executive Law, and it was directed to report officially to the Governor, the Attorney-General and the Legislature of the State of New York. See *Matter of DiBrizzi*, 303 N. Y. 206.

One of the defendants in question, Huron, a subsidiary of the Grace Line, paid approximately $18,000 to the union officials and business agents who were responsible for labor relations on the piers on which these very petitioners worked for Huron (Ex. No. 83, Vol. I, p. 363, contains the schedule of full payments by the defendant Huron to the various I. L. A. officials).

The testimony before the New York State Crime Commission also shows that this same defendant Huron paid the sum of $24,130.44 to "phantom" employees at the request of union officials for some years, including those involved in this action (Vol. I, p. 255, *et seq.*, Ex. No. 69).

The testimony before the Crime Commission further reveals a history of undemocratic and fraudulent practices in the relations between the ruling labor gangsters of the unions to which petitioners belonged and the member employees (Fourth Report, *supra,* p. 19, *et seq.*). There is also evidence to indicate that the so-called ratification of the collective bargaining contracts by the employee members of the union was a complete fraud and farce. Albert Osborne, the famous handwriting expert, rendered a report to the Crime Commission declaring that his investigation of a cross-section of the ballots on the contract ratification vote, including certain of the locals controlling piers on which the petitioners worked, indicated that some hundreds of supposed ballots, were all written in the hands of two men (Vol. III, p. 1897, Ex. No. 362).

It was also a common practice in the port for stevedoring companies, including those involved in related actions, to pay officers and officials of shipping companies bribes to secure business (Fourth Report, *supra,* p. 16, *et seq.*). Corrupt conduct on the part of stevedoring concerns, including those who are defendants in related actions was further indicated by huge unexplained cash disbursements and by the alteration of books and records to conceal payments to

conceal payments to union leaders and to officials of stevedoring companies (Fourth Report, *supra*, p. 17, *et seq.*).

This background and atmosphere of fraud, bribery, collusion and corruption involving the collective "bargaining" relations and pier practices belies the possibility of action in good faith on the part of the stevedoring defendants and prevents any affirmative conclusion that the labor agreements under which petitioners worked were negotiated or administered in good faith. The fraud and collusion lowered the working conditions of the union members including petitioners (Fourth Report, *supra*, p. 19). It further resulted in the exaction of huge sums from the public both directly from thefts and indirectly from increased operating costs (Fourth Report, *supra*, p. 59).

The Government of the United States was overcharged large amounts which it had to pay under its cost-plus contracts because of the flagrant corruption and collusion rampant in the port of New York. It also lost additional huge sums because of Income Tax violations.*

In his dissenting opinion in the court below, Judge Frank pointed out the fact that the disclosures of the New York State Crime Commission and other similar agencies should be investigated before final determination of the issues in this case (119, fn. 7).

The petitioners did not have adequate resources or time to discover the evidence now brought forth in the Fourth Report of the New York State Crime Commission. It should be noted that even so powerful an organization as the American Federation of Labor itself also had no facts on which it could take action until after the publication of the Fourth Report of the New York State Crime Commission. Yet recent reports in the New York Times (July 31,

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* The background of fraud and corruption would appear most important in evaluating the opinion of Judge Hand in the court below. See Judge Frank's comments in his dissent (124-125).

1953, p. 1; Aug. 10, 1953, p. 1; Aug. 11, 1953, p. 1), reveal that the American Federation of Labor will now insist upon the ouster of the present President of the International Longshoremen's Association and many other of the union officials who were responsible for the negotiation of the union contracts (which defendants claim were negotiated in good faith) because of the discoveries of fraud and collusion between these same officials and the officers of the stevedoring companies, including those involved as defendants herein.

The stevedoring concerns, including the defendants herein, in the employers' association which negotiated the labor contract with the union in the port, and handled labor relations under the contract, paid huge sums of money to the labor leaders of the union. It is not unreasonable to conclude that they expected a *quid pro quo*. To conclude that one of the reasons for these payments to the union officers was to insure that petitioners did not receive their proper overtime wages in accordance with Section 7 of the Fair Labor Standards Act is a distinct possibility. Support of this conclusion may be found in the fact that Joseph P. Ryan, the President of the Union, who received thousands of dollars from the stevedoring concerns, testified in behalf of the defendants in the first trial of this action. The possible connection of this fact with the union's support of the 1949 Amendments, of which the Senate Report makes much, should be closely scrutinized.

As Judge Frank noted in his dissent (119, fn. 7):

> "The Report makes much of the fact that the arrangements for 'clock overtime' were the 'result of collective bargaining,' that 'there is no evidence that the bargaining was other than at arms' length,' and that the bringing of the present suits were 'deplored' by the union officials. Were these facts of im-

portance, it might well be that recent disclosures, as to the activities of these union officials, would call for a remand to the trial court to ascertain whether these facts, stated in the Report, were true or whether the Senate Committee had been deceived."

Petitioners, therefore, contend that no defense of good faith should be or can be considered proved in this framework of newly disclosed conspiracy, fraud, collusion and corruption. The record is barren of any grounds to support the findings of good faith in negotiations of the agreement, except for concessions or stipulations entered into by petitioners' counsel during the first trial when such concessions were academic and could have had no anticipated bearing on the state of the record as to issues not yet present based on statutory amendments not yet passed.

Since defendants have been granted two extra opportunities, under the successive statutory amendments, to absolve themselves of payment of proper overtime as already found by this Court, this Court should now review this case to determine whether or not it should be remanded to the District Court for further proceedings to permit the petitioners to establish, on the basis of the discoveries of the New York State Crime Commission, the investigations of Federal and state grand juries, and the investigations of various Federal and State District Attorneys in New York City, and any additional testimony which they may adduce, whether or not union officials accepted bribes from the stevedoring concerns in connection with the negotiation or the administration of the collective bargaining agreements involved herein and possible corruption in the case of union influence, first to determine the pay practices and then to fight the claims of the petitioners herein.

Conclusion

For the foregoing reasons we respectfully request these petitions for writs of certiorari be granted.

August 12, 1953.

Respectfully submitted,

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Appendix A.

Pertinent Statutory Provisions.

Title 29 U. S. C. 258 (referred to herein as Section 9 of the Portal Act) provides as follows:

> "In any action * * * commenced prior to * * * the date of the enactment of this act based on any act or omission prior to the date of the enactment of this act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay * * * overtime compensation under the Fair Labor Standards Act of 1938, as amended, * * * if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belongs."

Title 29 U. S. C. 260 (referred to herein as Section 11 of the Portal Act) provides as follows:

> "In any action commenced prior to * * * the date of the enactment of this act to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 16 (b) of such act."

Appendix A.

Title 29 U. S. C. 207 (d) (5), (d) (6), (d) (7) (referred to herein as the 1949 Amendments to the Fair Labor Standards Act) provide as follows:

"(d) As used in this section the 'regular rate' at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

* * * *

"(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

"(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

"(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours), where such premium rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek."

Appendix A.

Title 29 USC 207 (g) provides as follows:

"(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section."

Public Law 393, 81st Congress, 1st Session, Section 16(e) provides as follows:

"(e) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended (in any action or proceeding commenced prior to or on or after the effective date of this Act), on account of the failure of said employer to pay an employee compensation for any period of overtime work performed prior to July 20, 1949, if the compensation paid prior to July 20, 1949 for such work was at least equal to the compensation which would have been payable for such work had Section 7 (d) (6) and (7) and section 7 (g) of the Fair Labor Standards Act of 1938, as amended, been in effect at the time of such payment."

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 264

JEFFERY M. ADDISON, JAMES AARON, ET AL.,
PETITIONERS

v.

HURON STEVEDORING CORP. AND BAY RIDGE
OPERATING CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (I R. 6–91) [1] is reported at 96 F. Supp. 142. The opinions in the Court of Appeals (II R. 99–126) are reported at 204 F. 2d 88.

[1] The designations "I R." and "II R." refer to Volumes I and II of the record, respectively; and arabic numerals following the latter designations refer to the page numbers of the respective volumes. The designation "F" refers to the numbers of the district court's findings of fact.

JURISDICTION

The judgments of the court of appeals were entered on March 20, 1953 (II R. 127, 128). On June 6, 1953, by order of Mr. Justice Jackson, the time for filing a petition for a writ of certiorari was extended to and including August 17, 1953 (II R. 129). The petition for a writ of certiorari was filed on August 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the court below erred in affirming the district court's finding, in an action under the Fair Labor Standards Act, that the respondents' nonpayment of the claimed overtime pay was in good faith, in conformity with, and in reliance on, administrative rulings of agencies of the United States, so as to raise the bar of Section 9 of the Portal-to-Portal Act.

2. Whether the court of appeals erred in holding that the district court did not abuse its discretion in refusing, under Section 11 of the Portal-to-Portal Act, to allow liquidated damages.

3. Whether the retroactive operation of Sections 9 and 11 of the Portal-to-Portal Act deprives petitioners of property without due process of law.

4. Whether the 1949 amendments to the Fair Labor Standards Act, retroactively specifying the elements to be included in the calculation of the

statutory regular rate of pay for petitioners, deprive petitioners or their attorneys of property without due process of law.

STATUTES INVOLVED

The pertinent provisions of the Portal-to-Portal Act of 1947, 61 Stat. 84, 29 U. S. C. (Supp. V) 251 *et seq.*, and of the Fair Labor Standards Act of 1938, as amended by the Act of July 20, 1949, c. 352, 63 Stat. 446, and by the Act of October 26, 1949, c. 736, 63 Stat. 912 (29 U. S. C. (Supp. V) 207), are set forth in the Appendix, *infra*, pp. 27–32.

STATEMENT

The petitioners brought these actions, which are before this Court for the second time, to recover overtime compensation and liquidated damages allegedly due under the Fair Labor Standards Act of 1938.[2] The petitioners are longshoremen employed by the respondent stevedoring companies. The terms of their employment were fixed by collective bargaining agreements between the International Longshoremen's Union, A. F. of L., and the New York Shipping Association, an employers' association of which respondents were members (F. 10; I R. 95). The issue involved in the former proceedings was whether, under the collective bargaining agreement, the

[2] Two suits involving 426 plaintiffs were brought (F. 249; I R. 212). 23 test plaintiffs were selected, and it was stipulated that the decision as to these plaintiffs should control the outcome as to all plaintiffs (F. 1–4; I R. 92–94).

pay rates fixed for work outside of certain daytime hours on weekdays—rates designated by the agreement as "overtime" and amounting to one and one-half times the designated "straight time" rate—were required to be included in computing the "regular rate" defined by Section 7 of the Act. This issue, after being passed upon by the district court and by the court below, was decided by this Court in *Bay Ridge Operating Co., Inc.* v. *Aaron,* 334 U. S. 446. The Court held that the contract-designated "overtime rate" must be included in the calculation of the regular rate under the Act.

While these actions were pending in the court below on the former appeal, Congress enacted the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. (Supp. V) 251 *et seq.*). Among other provisions, Section 9 of the Portal Act retroactively validated an employer's failure to pay statutory overtime where the omission was "in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States * * *." See Appendix, *infra,* pp. 29–30. Section 11 of the Portal Act provided that no liquidated damages could be recovered for past failure to pay statutory overtime if the employer could show that the failure was "in good faith and that he had reasonable grounds for believing that his act or omission was not a violation." See *infra,* p. 30. This Court remanded the case under

a broad mandate permitting the district court to consider any amendments to the pleadings and any further evidence "that the District Court [might] consider just." 334 U. S. at 477. The respondents then set up defenses based upon Sections 9 and 11 of the Portal-to-Portal Act, to the effect that they had in good faith relied on and acted in conformity with interpretative rulings of the Wage and Hour Division of the Department of Labor, and also of the Corps of Engineers of the Army, of the War Labor Board, and of the War Shipping Administration, and that they had reasonable grounds to believe that this conduct was in conformity with the Fair Labor Standards Act.

While the second trial was pending in 1949, Congress enacted amendments which specified the elements to be included in the calculation of "regular rate" of pay, as used in Section 7 of the Fair Labor Standards Act. Act of July 20, 1949, c. 352, 63 Stat. 446; Act of October 26, 1949, c. 736, 63 Stat. 910. These amendments were made retroactive. See 63 Stat. 446; 63 Stat. 920. Clock hour overtime of the kind involved in the present agreements was excluded from the regular rate, so long as the rates designated by the contract as "overtime" were equal to one and one-half times the contractual "straight time" rate established in good faith by a collective bargaining agreement. The respondents were then allowed to amend their answers to set up defenses based on these and other provisions of the 1949 statutes (see I R.

57).[3] The facts, as found by the district court, relating to all these defenses are as follows:

Stevedoring companies on the Pacific Coast belonged to an employers' association, similar to the New York Shipping Association, known as the Waterfront Employers Association (F. 62; I R. 118). In November 1938, the Pacific Coast association applied to the Administrator of the Wage and Hour Division of the Department of Labor for a ruling on the question whether the overtime pay practices under collective bargaining agreements covering longshoremen on the West Coast, and containing provisions substantially identical with those in the present case, were in conformity with the overtime requirements of the Fair Labor Standards Act (F. 63–67; I R. 118–120). This inquiry was referred to the Pacific Coast Regional Office, and that office, on December 6, 1938, through the Regional Director and the Regional Counsel, replied stating that payment in accordance with the collective bargaining agreement met the requirements of the Act (F. 68–74; I R. 120–124). Knowledge of this ruling was communicated to the respondent Huron[4] through officers of Huron who were also officers of affiliated corporations which be-

[3] The July and October 1949, amendments were incorporated directly in a revised version of the Fair Labor Standards Act. 29 U. S. C. (Supp. V) 207.

[4] The respondent Huron Stevedoring Corp. is herein referred to as Huron. The respondent Bay Ridge Operating Co., Inc., is referred to as Bay Ridge.

longed to the Pacific Coast Waterfront Employers Association (F. 75, 76, 78–83; I R. 125–127). The Pacific Coast agreement with reference to which the ruling had been made contained provisions as to overtime substantially similar to those in the East Coast agreements here in question (F. 77, 13; I R. 125, 96), and the district court found that the respondent Huron acted in reliance on the ruling of the Pacific Coast regional office of the Wage and Hour Division (F. 84; I R. 127).

Reliance was placed by both respondents on Interpretative Bulletin No. 4, "Maximum Hours and Overtime Compensation," an interpretation of Section 7 of the Fair Labor Standards Act originally issued by the Department of Labor in 1938 and amended in 1939 and 1940. Among other things this interpretative bulletin contained a number of examples of contract provisions relating to overtime which would conform with the requirements of the Act (F. 85, 88; I R. 127, 130–138). Officers of both respondents carefully examined the information contained in this bulletin, as well as its amendments and supplements issued from time to time and related regulations of the Labor Department, and concluded that the provisions of the longshoremen's agreements here in question conformed with the interpretation contained in the bulletin (see F. 86–89, 94; I R. 129–139, 143).

In 1942, the respondent Huron and the War

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Department, Corps of Engineers, entered into a contract under which Huron was to perform stevedoring services for the Army (F. 96; I R. 143). The contract contained provisions to the effect that Huron would be reimbursed by the Army for all costs, including labor costs, and it was provided that pay schedules must be approved by the Army before payment.[6] Under the contract, Huron also submitted schedules of the rates for "straight time" and "overtime" as agreed in the longshoremen's collective bargaining agreement and specifically asked for approval of the practice of paying contract overtime for work falling in the clock hour periods provided by the agreement without including such overtime in calculating the statutory regular rate (F. 97–99; I R. 144–147). The Army approved the practice and paid bills submitted by Huron in accordance with it (F. 100, 101; I R. 147).

Both respondents performed stevedoring services during the War under contract with the War Shipping Administration (F. 116, 117; I R. 154). The so-called "warshipsteve" contracts covering

[6] It is for this reason that the Department of Justice has represented respondents in this litigation and that the Solicitor General appears on their behalf in this Court. The United States will ultimately have to pay such judgments as may be rendered against respondents. During World War II, the period involved here, the operation of almost all ships was taken over by the United States and substantially all stevedoring was performed for the account of the Government. See *Bay Ridge Operating Co.* v. *Aaron*, 334 U. S. 446, 453; F. 116; I R. 154.

these services provided that no wage schedule could be established by the respondents without the approval of the War Shipping Administration (F. 118; I R. 155–157). Under this agreement, the respondents, in addition to a number of other stevedoring companies in the Port of New York, submitted to the War Shipping Administration schedules of wage rates clearly showing their practices with respect to contract overtime and the relation of these practices to the overtime requirements of the Fair Labor Standards Act (F. 121, 122, 128, 130; I R. 159–160, 161, 162). The War Shipping Administration approved the schedules in May 1943 and also from time to time audited the respondents' bills; all bills were paid by the Administration without objection (F. 128, 130–132; I R. 161, 162).

Finally, the longshoremen's collective bargaining agreement of 1941, which raised wage rates although maintaining the same practices with respect to straight time and overtime, was submitted in accordance with the Stabilization Act of 1942 (Act of October 2, 1942, c. 578, 56 Stat. 765) to the War Labor Board, which approved the increases (F. 104–113; I R. 148–153). The Stabilization Act forbade the War Labor Board to approve payments in violation of the Fair Labor Standards Act, and respondents believed that approval of the contract carried with it approval of

the payment practices under the Fair Labor Standards Act (see F. 106–107; I R. 150).

On October 15, 1943, the Wage and Hour Administrator wrote a letter to the War Shipping Administration bringing to the attention of the Administration a possible conflict between the payment practices of the stevedoring companies and the Fair Labor Standards Act and asking for the Administration's comments and suggestions in view of the Administration's contracts with the stevedoring companies, who were permitted to make no changes in wage rates without approval of the Administration (F. 158; I R. 173–175).[6] The situation was intensely investigated by the War Shipping Administration and the Department of Labor (F. 159–166; I R. 176–177); and these agencies, as well as the War and Navy Departments, agreed to submit disagreements as to the proper practice to the Department of Justice (F. 171–175; I R. 179–180). On the basis of the

[6] For a period before October 15, 1943, there had been some difference of opinion among officials of various regional offices of the Wage and Hour Division of the Department of Labor regarding the treatment to be given clock hour overtime in calculating the regular rate (see F. 136–139, 144, 146, 153–157; I R. 163–166, 167, 171–173). The fact of this disagreement was not brought to the attention of respondents until January 1944 (F. 156; I R. 173).

In this connection, it should be noted that the instant cases comprise only claims beginning October 15, 1943, the date of the letter referred to above. The instant actions originally included claims antedating the date of this letter, but such claims were abandoned (F. 5; I R. 94).

investigation by these agencies and of its own independent investigation, the Department of Justice decided to defend the practices approved under the War Shipping contracts against suits either by employees or by the Department of Labor, and this decision was made known to the respondents (F. 178–180; I R. 181–182).

Meanwhile, the War Shipping Administration had continued to approve the practices of respondents and other stevedores in the Port of New York (F. 168; I R. 178); and, although its investigations continued (F. 183–189; I R. 182–185), the Administration made renewal contracts with the respondents and other stevedoring companies (F. 190; I R. 185). Also, in reply to a request by the New York Shipping Association, the Administration advised the members of the Association that they were justified in certifying under the contracts that their pay practices conformed with the requirements of the Fair Labor Standards Act and, indeed, that the Administration would permit no changes in the pay practices of the stevedores (F. 193–196; I R. 187–190).

The district court found that both respondents acted in good faith in relying upon the consistent rulings and interpretations of the War Shipping Administration, the War Department, the War Labor Board, and the Department of Justice, as well as on the interpretative bulletins and the letter of the Pacific Coast Regional Director of the Wage and Hour Division of the

Labor Department (F. 84, 94, 103, 113, 135a, 197; I R. 127, 142, 148, 153, 163, 190). The district court held, on the basis of these findings, that the actions were, with certain minor exceptions,[7] barred by Section 9 of the Portal-to-Portal Act (I R. 26–48). On similar grounds the court also held, under Section 11, that no liquidated damages should be allowed (I R. 53–57). As a separate and additional ground of decision, it held that Section 7 of the Fair Labor Standards Act, as amended in 1949, precluded recovery (I R. 57–69). The court rejected the petitioners' contention that the Portal-to-Portal Act and the 1949 amendments unconstitutionally deprived the petitioners of vested rights and petitioners' attorneys of counsel fees (I R. 69–81).

The court of appeals affirmed (II R. 99–126). The court unanimously upheld (a) the decision as to the defenses under the Portal Act based on good faith and (b) the constitutionality of the Portal Act. Judge Swan upheld the constitutionality of the Portal Act on the basis of the court's earlier decisions in *Battaglia* v.

[7] The court gave judgment for the petitioners for minor amounts, totalling $449.99, based on the fact that flat 5-cent, 10-cent, and 15-cent an hour skill differentials were paid to longshoremen who performed work as "headers," "gangwaymen," and assistant foremen. These fixed differentials were added to the contract overtime rates as well as to the straight time rates, so that the overtime rates for men doing such work did not amount to one and a half times the straight time rates. See fn. 14, *infra*, p. 25.

General Motors Corp., 169 F. 2d 254 (C. A. 2), certiorari denied, 335 U. S. 887, and in *Darr* v. *Mutual Life Ins. Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871 (II R. 101). He also upheld the validity of the 1949 amendments on the basis of the same cases (II R. 102). His opinion for the court likewise affirmed the district court's decision as to counsel fees and added that, since counsel fees were not to be settled until after appellate review had been exhausted, the latter question was premature (II R. 103). Judge Learned Hand, who concurred in Judge Swan's opinion, expressed himself as "not entirely satisfied with the grounds" on which *Battaglia* v. *General Motors Corp.* was decided, and concurred specially as to the constitutionality of the statutes on the ground that, accepting the congressional findings of fact as true, the legislative action was reasonable because the social utility of averting the threatened evils outweighed the utility of preserving a "windfall" gained by the petitioners under the former decision of this Court (II R. 110–116). Judge Frank dissented, insofar as the 1949 amendments were concerned, holding that the legislative findings of the Portal-to-Portal Act were not applicable to the 1949 amendments (II 116–127). He agreed as to the Portal Act (II R. 116) and with the determinations based on that statute (II R. 126).

ARGUMENT

The judgments below, which are clearly correct, do not warrant review by this Court. The decision of both courts was based on alternative grounds—the good faith defenses of the Portal-to-Portal Act and the 1949 amendments to the Fair Labor Standards Act. The case may therefore be disposed of by upholding the applicability and validity of the Portal-to-Portal Act provisions without reaching questions arising under the 1949 amendments. As to the applicability of the Portal-to-Portal Act, the only question presented by the record is whether the respondents acted "in good faith in conformity with and in reliance on" administrative rulings of any agencies of the United States. This, we believe, is a question of fact on which, under settled principles, the concurrent findings of the two courts below should not be disturbed. The constitutionality of the Portal-to-Portal Act has been upheld by the nine courts of appeals before which it has been challenged, and this Court has six times refused to review the question.[8]

[8] *Manosky* v. *Bethlehem-Hingham Shipyard, Inc.*, 177 F. 2d 529 (C. A. 1); *Battaglia* v. *General Motors Corp.*, 169 F. 2d 254 (C. A. 2), certiorari denied, 335 U. S. 887; *Darr* v. *Mutual Life Ins. Co.*, 169 F. 2d 262 (C. A. 2), certiorari denied, 335 U. S. 871; *Thomas* v. *Carnegie-Illinois Steel Corp.*, 174 F. 2d 711 (C. A. 3); *Seese* v. *Bethlehem Steel Co.*, 168 F. 2d 58 (C. A. 4); *Atallah* v. *B. H. Hubbert & Son, Inc.*, 168 F. 2d 993 (C. A. 4), certiorari denied *sub nom. Cingrigrani* v. *B. H. Hubbert & Son, Inc.*, 335 U. S. 868; *Fisch* v. *General Motors Corp.*, 169 F. 2d 266 (C. A. 6),

1. The questions dealing with the applicability of the good faith defenses of the Portal-to-Portal Act are essentially factual, and the petitioners' attempt to raise questions of statutory interpretation are insubstantial.

a. Petitioners contend (Pet. 10–13) that the provisions which retroactively validate payments in good faith (Sections 9 and 11, *infra*, pp. 29–30) were not intended by Congress to apply to the situation presented by this case, but were restricted to that presented by such cases as *Anderson* v. *Mt. Clemens Pottery Co.*, 328 U. S. 680, dealing with failure to pay for walking time and other "portal-to-portal" activities in the strict sense of the term. This contention is wholly without merit. It is raised for the first time in this Court. It finds no support in the language of the statute and the legislative history conclusively refutes it.

The report of the House Committee on the Judiciary on the bill which became the Portal-

certiorari denied, 335 U. S. 902; *Newsom* v. *E. I. duPont de Nemours & Co.*, 173 F. 2d 856 (C. A. 6), certiorari denied, 338 U. S. 824; *Rogers Cartage Co.* v. *Reynolds*, 166 F. 2d 317 (C. A. 6); *Busch* v. *Wright Aeronautical Corp.*, 174 F. 2d 322 (C. A. 6); *Lee* v. *Hercules Powder Co.*, 171 F. 2d 950 (C. A. 7); *Bumpus* v. *Remington Arms Co.*, 183 F. 2d 507 (C. A. 8); *Lassiter* v. *Guy F. Atkinson Co.*, 176 F. 2d 984 (C. A. 9); *Role* v. *J. Neils Lumber Co.*, 171 F. 2d 706 (C. A. 9); *Potter* v. *Kaiser Co.*, 171 F. 2d 705 (C. A. 9); *Adkins* v. *E. I. duPont de Nemours & Co.*, 176 F. 2d 661 (C. A. 10), certiorari denied, 338 U. S. 895; *McDaniel* v. *Brown & Root, Inc.*, 172 F. 2d 466 (C. A. 10).

to-Portal Act treats the bill as comprising two parts. The first part contains sections dealing with "claims based on activities not at the time considered compensable by express agreement or by custom or practice" (H. Rept. No. 71, 80th Cong., 1st Sess., p. 2)—portal-to-portal claims in the narrow sense. The provisions that became Section 2 of the Act, to which the President's message, relied on by the petitioners (Pet. 12–13), is solely directed, fall under this head. On the other hand, the good faith defenses now contained in Sections 9 and 11 were expressly subsumed under the second heading of "provisions affecting all claims, causes of action, and actions under the Fair Labor Standards Act * * *, the Walsh-Healey Act * * *, and the Bacon-Davis Act * * *." H. Rept. No. 71, 80th Cong., 1st Sess., p. 7. Cf. *Unexcelled Chemical Corp.* v. *United States,* 345 U. S. 59.

The statute is framed to carry out this legislative intent. The broad language of Section 9 makes its provisions applicable to "any action or proceeding" and bars liability "on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act or the Bacon Davis Act * * *." This contrasts with the far more limited applicability of Sections 2 and 4 dealing with the narrow portal-to-portal situation; the President's message was directed to those sec-

tions. Moreover, of the ten evils listed in the congressional findings and declaration of policy contained in Section 1 of the Portal-to-Portal Act, all but the fifth, dealing with the narrowest portal-to-portal situation, were present in the clock hour overtime situation. See *infra*, pp. 27–29. Accordingly, where the language of the statute so permits, as it does in Sections 9 and 11, the statute should be read broadly enough to remedy these evils wherever they occur.

b. Likewise unfounded is petitioners' effort to raise questions of the meaning of the term "good faith" in Sections 9 and 11 (Pet. 13–21). It is urged (Pet. 13, 15) that the case presents a question of whether good faith must be measured by a subjective or by an objective standard—that is, whether the conduct of an employer must merely be innocent or must also be such as a reasonable man would have undertaken in the circumstances. However, this question is not present in this case. The district court and the court of appeals found that respondents had met the requirements of either standard. See I R. 29, 35, 214; II R. 104, 105. Since the district court found that the course of conduct was followed "innocently" and "with an honest intention" as well as "in the same manner as a reasonably prudent man would have acted under the same circumstances," Judge Swan's discussion of which test was correct (II R. 103–104) is dictum, as he himself recognized (II R. 104).

It is also urged that respondents could not, as a matter of law, have been acting in good faith once they were apprised of the October 15, 1943, letter of the Wage and Hour Administrator, questioning the correctness of the administrative interpretations on which they had been relying (see *supra*, p. 10), and of litigation questioning the meaning of the statutory "regular rate." However, when the Wage and Hour Administrator first expressed doubts as to the prior interpretations, the pay practices under the longshoremen's collective bargaining agreements had long been established and had already been sanctioned by a series of rulings not only by the Wage and Hour Division, but also by the Army, the War Labor Board, and the War Shipping Administration. For this reason alone, it cannot be said that the district court was clearly erroneous in finding that the employers' reluctance to disrupt their labor relations by revising their entire system of wage schedules was in good faith. Moreover, the petitioners' contention overlooks the fact that, under their contracts with the Government, the employers could not change their practice, because such a change would not have met with the approval of the War Shipping Administration (see *supra*, pp. 8–9, 11).

It also overlooks the desire of Congress, as expressed in the congressional findings and declaration of policy, to uphold "long established customs, practices and contracts between employers and employees" (see *infra*, p. 27). And it over-

looks the broad remedial purpose of the Portal Act. To hold that knowledge of the existence of conflicting rulings precludes reliance on the defense of good faith would restrict the protection of the Act to a very small part of the large group of employers which was the object of congressional solicitude, for a similar conflict in rulings existed throughout most of the period covered by the Act. Such an interpretation would also deprive of significance the provision authorizing reliance on a ruling of "any agency."

The legislative history quoted by the petitioners in support of their reading of the term "good faith" (Pet. 17–18) refers to a situation in which an employer chooses to follow the more favorable of two conflicting rulings for the purpose of reducing his wage costs. In view of the fact that the respondents' wage costs were reimbursable under their contracts with the Government, it cannot be said that the district court erred in finding that no such motivation was present in this case. Congress did not lay down the automatic rule that a conflict of rulings precludes a finding of good faith. Nor can it be said as a matter of law that, in all the circumstances, the respondents could not have been acting in good faith.[9]

[9] The contention (Pet. 20) that the letters and rulings of the War Shipping Administration do not constitute the kind of "formalized conduct" or "affirmative action" or "interpretative ruling" required by Section 9 is unfounded. It is contradicted by the broad language of Section 9 permitting

2. Since the Portal-to-Portal Act is a complete defense to these actions, insofar as they are before the Court, the questions presented by the 1949 amendments to the Fair Labor Standards Act need not be reached. However, these amendments also constitute a complete bar to the action. Their applicability is indisputable; for their legislative history shows that they were aimed at the situation created by this Court's former decision in this very case. See S. Rept. No. 402, 81st Cong., 1st Sess., p. 1; H. Rept. No. 121, 81st Cong., 1st Sess., p. 2.

Petitioners contend that the 1949 amendments are not available to the respondents as defenses because the collective bargaining agreements were not executed in good faith, as the amendments require (*infra*, p. 31). They ask the Court to take judicial notice of matter outside the record to establish this contention. But the matter referred to is not relevant. The requirement of good faith in the execution of the agreements was imposed for the purpose of preventing evasion of the overtime requirements of the Fair Labor

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reliance on any "regulation, order, ruling, approval, or interpretation, * * * or any administrative practice or enforcement policy" of any agency. It is also contradicted by petitioners' concession (Pet. 20) that the defense of good faith was available to the respondents for all payments before the October 15, 1943 letter of the Wage and Hour Administrator; respondents' defense as to the subsequent period is in part based on the same actions by the War Shipping Administration which petitioners appear to concede validated the respondents' conduct for the prior period.

Standards Act through the use of split-day plans and similar evasive schemes.[10] It is not suggested that the clock hour overtime plan in this case was made for evasive purposes. The plan has been in use in longshoremen's collective bargaining agreements since 1916 (F. 10, 14, 15; I R. 95, 100) and similar plans have been prevalent in many industries. S. Rept. 402, 81st Cong., 1st Sess., pp. 5, 6.

The statutory requirement thus has no relation to the petitioners' generalized allegations of corruption in the stevedoring industry in the Port of New York. And even if the allegations of corruption are accepted as true for the purpose of argument, it is not suggested that the officials of the International Longshoremen's Union failed to negotiate at arm's length in the matter of wages and related benefits. The wages of longshoremen in the Port of New York compare favorably with those of other unskilled laborers (see U. S. Dept. of Labor, Bureau of Labor Statistics, Bulletins

[10] The requirement of good faith was put in the bill "for the purpose of distinguishing agreements subject to the [amendments] from fictitious schemes and artificial or evasive devices such as have been condemned in a long line of decisions by the Supreme Court and several circuit courts of appeals, including, to mention a few, *Walling* v. *Helmerich & Payne* (323 U. S. 37), *Walling* v. *Alaska Pacific Consolidated Mining Co.*, (152 F. (2d) 812 (C. C. A. 9)), *Robertson* v. *Alaska Juneau Gold Mining Co.* (157 F. (2d) 876), and *Walling* v. *Youngerman-Reynolds Hardwood Co.*, (325 U. S. 419)." S. Rept. No. 402, 81st Cong., 1st Sess., p. 11; see also H. Rept. No. 121, 81st Cong., 1st Sess., p. 3.

No. 1101, pp. 16–18; No. 1116–16, pp. 10–11 (1952, 1953)), and periodic wage increases have been obtained (see F. 15; I R. 100). Moreover identical agreements have been approved by locals outside the Port of New York (see U. S. Dept. of Labor, Bureau of Labor Statistics, Series 4, No. 17, *North Atlantic Longshoring,* 1934–, p. 1), and these locals are not attacked in the allegations of corruption contained in the material cited by the petitioners.

3. a. The constitutionality of the retroactive aspects of the Portal-to-Portal Act is established by the decisions of nine courts of appeals. See fn. 8, *supra,* p. 14. The petitioners advance no reason why this Court should now depart from its steadfast refusal to review the question. The concurrent ruling of the nine appellate courts is, we think, clearly correct. Rights conferred by the Fair Labor Standards Act are not vested, because they are not contractual; they are merely statutory rights, which the legislature may withdraw at any time. Cf. *Brooklyn Savings Bank* v. *O'Neil,* 324 U. S. 697. Petitioners did not change their position in reliance on the rights conferred by the Fair Labor Standards Act for it is clear that both sides entered the collective bargaining agreement in the belief that it conformed with the statute.

Further, even if the petitioners acquired vested rights, Congress has the power to modify them in the exercise of its power over interstate com-

merce, so long as the modification bears a reasonable relation to the objects for which Congress exercises its power. E. g., *Norman* v. *Baltimore & O. R. R. Co.*, 294 U. S. 240; *Omnia Commercial Co.* v. *United States*, 261 U. S. 502; *Louisville & N. R. R.* v. *Mottley*, 219 U. S. 467. The congressional findings and declaration of policy contained in Section 1 of the Portal-to-Portal Act demonstrate that a reasonable basis existed for Congress' exercise of its power. And whether these findings are conclusive or are rebuttable by contrary evidence is immaterial. It is well settled that the burden of establishing the incorrectness of legislative findings is on the party attacking them (*Weaver* v. *Palmer Bros.*, 270 U. S. 402, 410; *Minnesota Rate Cases*, 230 U. S. 352, 452), and petitioners point to no evidence tending to refute the findings.[11]

b. For similar reasons, the 1949 amendments to the Fair Labor Standards Act are also constitutional,[12] although it is unnecessary for the Court to reach this question.[13] It is suggested by peti-

[11] Judge Hand's opinion below (II R. 110–116) gives an extended rationale for upholding the Portal Act.

[12] Judge Frank urged that the legislative findings in the Portal-to-Portal Act do not apply to the 1949 amendments. But the congressional committee dealing with the 1949 acts expressly made them applicable. S. Rept. No. 402, 81st Cong., 1st Sess., p. 10.

[13] The Court of Appeals for the Ninth Circuit has upheld the 1949 acts on the basis of its decisions in Portal-to-Portal Act cases. See *Moss* v. *Hawaiian Dredging Co.*, 187 F. 2d 442, 445 (C. A. 9).

tioners that the amendments were an unconstitutional encroachment by the legislature upon the judiciary, insofar as the statute applies to this case in which the petitioners had once prevailed under the former law. But the statute, although aimed at the problem presented by this litigation, did not reverse the results of, or establish a rule of decision for, a particular lawsuit. It established standards of general applicability. Cf. *Pope* v. *United States,* 323 U. S. 1. Moreover, the former decision of this Court in this case was not a final judgment and did not purport to fix liability; it left the final determination of liability to be decided by the courts below (*supra,* p. 5).

c. No question meriting review is presented by the petitioners' contention that their attorneys were unconstitutionally deprived of the statutory counsel fees. The reasons which permit Congress to remove the substantive liability apply with at least equal force to counsel fees. Cf. *Frisbie* v. *United States,* 157 U. S. 160, 166. Moreover, the attorneys' rights to fees were, by the terms of the Fair Labor Standards Act itself, always contingent on their prevailing in the litigation, so that whatever rights they had were plainly contingent rather than vested. Cf. Cardozo, J., dissenting, in *Coombes* v. *Getz,* 285 U. S. 434, 448. The Fair Labor Standards Act plainly contemplated that the right to counsel fees should fall where there was no liability under the Act, and

here the Portal-to-Portal Act (as well as the 1949 change in the statute) bars such liability.[14]

[14] Petitioners' complaint (Pet. 26–27) on the question of so-called "skill differentials" relates to a matter which is too infrequent in occurrence and too insignificant in amount to be a basis for review by this Court. Longshoremen who worked as headers, gangwaymen, or assistant foremen were paid an overriding premium of 5¢, 10¢, or 15¢, an hour, respectively, for their work in these skilled capacities (F. 16; I R. 101). These premiums were added to the contract straight time rates and the contract overtime rates with the result that their pay when working in contract overtime hours fell 2½¢, 5¢, or 7½¢ below a full 150 per cent of the straight time rates. This practice was not stated in the collective bargaining agreements. Consequently, the district court was of the opinion that the Portal-to-Portal Act defenses which were based upon the approval of the collective bargaining agreements by the Engineer Corps, the War Labor Board and War Shipping Administration were not applicable where skill differentials were involved. The court nevertheless permitted the respondents to exclude from the computation of the regular rate the full overtime payments made to headers, gangwaymen, and assistant foremen when the work for which they were paid these higher rates followed previous work for eight straight-time hours in the same day or forty straight-time hours in the same week, and therefore fell within the provisions of Section 7 (d) (5) of the amended Fair Labor Standards Act, which excludes from the regular rate premiums paid because of hours previously worked in excess of the statutory workday or workweek. *Infra*, p. 31. The judge justified his result on the provisions of the "Warshipsteve" contract requiring the employers to pay overtime after eight daily hours or forty weekly hours (F. 119; I R. 157), and on the fact that it had long been the practice of the respondents to pay overtime after a man had worked at straight time the maximum number of hours permitted under the Fair Labor Standards Act (F. 20, 21; I R. 103).

Judge Swan stated (II R. 107) in the court of appeals that that court was unable to understand the basis for the district

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1953.

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court's "inference" that the higher rates were paid because the work was in excess of a stated quantity of previous work. Consequently, it was unwilling to allow the employers to exclude from calculation of the regular rate, and to take credit for, the entire overtime premium under Section 7 (d) (5) of the Fair Labor Standards Act, as amended. The court nevertheless ruled that the employers were entitled to exclude and take credit for a portion of the overtime premium equal to 50 per cent of the contractual straight time rate exclusive of the skill differential. This result was justified on the basis of the district court's finding of a defense under the Portal-to-Portal Act where the contract overtime rates equalled one and one-half times the contract straight time rates.

We think that the district court's decision was correct in view of its findings that longshoremen could not work more than the statutory maximum number of hours without being paid contract overtime (F. 20, 21, 119; I R. 103, 157), since these findings clearly support an inference that the higher rates were paid because the work was in excess of either eight daily or forty weekly hours of previous work. Even if our position should be thought erroneous, the error is too trifling and the issue involved too devoid of precedential significance to furnish a basis for review by this Court.

APPENDIX

1. The pertinent provisions of the Portal-to-Portal Act of 1947 (61 Stat. 84, 29 U. S. C. (Supp. V) 251 *et seq.*) read as follows:

> SECTION 1. (a) The Congress finds that the Fair Labor Standards Act of 1938, as amended, has been interpreted judicially in disregard of long-established customs, practices, and contracts between employers and employees, thereby creating wholly unexpected liabilities, immense in amount and retroactive in operation, upon employers with the results that, if said Act as so interpreted or claims arising under such interpretations were permitted to stand, (1) the payment of such liabilities would bring about financial ruin of many employers and seriously impair the capital resources of many others, thereby resulting in the reduction of industrial operations, halting of expansion and development, curtailing employment, and the earning power of employees; (2) the credit of many employers would be seriously impaired; (3) there would be created both an extended and continuous uncertainty on the part of industry, both employer and employee, as to the financial condition of productive establishments and a gross inequality of competitive conditions between employers and between industries; (4) employees would receive windfall payments, including liquidated damages, of sums for activities performed by them without any expectation of reward beyond that included in their agreed rates

of pay; (5) there would occur the promotion of increasing demands for payment to employees for engaging in activities no compensation for which had been contemplated by either the employer or employee at the time they were engaged in; (6) voluntary collective bargaining would be interfered with and industrial disputes between employees and employers and between employees and employees would be created; (7) the courts of the country would be burdened with excessive and needless litigation and champertous practices would be encouraged; (8) the Public Treasury would be deprived of large sums of revenues and public finances would be seriously deranged by claims against the Public Treasury for refunds of taxes already paid; (9) the cost to the Government of goods and services heretofore and hereafter purchased by its various departments and agencies would be unreasonably increased and the Public Treasury would be seriously affected by consequent increased cost of war contracts; and (10) serious and adverse effects upon the revenues of Federal, State, and local governments would occur.

The Congress further finds that all of the foregoing constitutes a substantial burden on commerce and a substantial obstruction to the free flow of goods in commerce.

The Congress, therefore, further finds and declares that it is in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act be enacted.

The Congress further finds that the varying and extended periods of time for which, under the laws of the several States, potential retroactive liability may be imposed

upon employers, have given and will give rise to great difficulties in the sound and orderly conduct of business and industry.

The Congress further finds and declares that all of the results which have arisen or may arise under the Fair Labor Standards Act of 1938, as amended, as aforesaid, may (except as to liability for liquidated damages) arise with respect to the Walsh-Healey and Bacon-Davis Acts and that it is, therefore, in the national public interest and for the general welfare, essential to national defense, and necessary to aid, protect, and foster commerce, that this Act shall apply to the Walsh-Healey Act and the Bacon-Davis Act.

(b) It is declared to be the policy of the Congress in order to meet the existing emergency and to correct existing evils (1) to relieve and protect interstate commerce from practices which burden and obstruct it; (2) to protect the right of collective bargaining; and (3) to define and limit the jurisdiction of the courts.

* * * * *

SEC. 9. * * * In any action or proceeding commenced prior to or on or after the date of the enactment of this Act [May 14, 1947] based on any act or omission prior to [May 14, 1947], no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United

States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

* * * * *

SEC. 11. * * * In any action commenced prior to or on or after [May 14, 1947] to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 16 (b) of such Act.

* * * * *

2. The pertinent provisions of the Fair Labor Standards Act of 1938, as amended by the Act of July 20, 1949, c. 352, 63 Stat. 446, and by the Act of October 26, 1949, c. 736, 63 Stat. 912 (29 U. S. C. (Supp. V) 207) read as follows:

SEC. 7. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek

longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

(d) As used in this section the "regular rate" at which an employee is employed shall be deemed to include all remuneration for employment paid to, or on behalf of, the employee, but shall not be deemed to include—

* * * * *

(5) extra compensation provided by a premium rate paid for certain hours worked by the employee in any day or workweek because such hours are hours worked in excess of eight in a day or forty in a workweek or in excess of the employee's normal working hours or regular working hours, as the case may be;

(6) extra compensation provided by a premium rate paid for work by the employee on Saturdays, Sundays, holidays, or regular days of rest, or on the sixth or seventh day of the workweek, where such premium rate is not less than one and one-half times the rate established in good faith for like work performed in nonovertime hours on other days; or

(7) extra compensation provided by a premium rate paid to the employee, in pursuance of an applicable employment contract or collective-bargaining agreement, for work outside of the hours established in good faith by the contract or agreement as the basic, normal, or regular workday (not exceeding eight hours) or workweek (not exceeding forty hours, where such premium

rate is not less than one and one-half times the rate established in good faith by the contract or agreement for like work performed during such workday or workweek.

* * * * *

(g) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (d) shall be creditable toward overtime compensation payable pursuant to this section.

U. S. GOVERNMENT PRINTING OFFICE: 1983